

Letter of Findings: 04-20120368
Use Tax
For the Year 2012

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ISSUE

I. Use Tax – Airplane.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2(a); IC § 6-2.5-4-1(b), (c); IC § 6-8.1-5-1(c); [45 IAC 2.2-3-4](#); Horn v. Comm'r, 968 F.2d 1229, (D.C. Cir. 1992); Comm'r v. Transp. Trading & Terminal Corp., 176 F.2d 570 (2d Cir. 1949); Helvering v. Gregory, 69 F.2d 809 (2nd Cir.1934); Rhoads v. Ind. Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Ind. Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Fell v. West, 73 N.E. 719 (Ind. App. 1905); Dept. of Treasury v. Dietzen's Estate, 21 N.E.2d 137 (Ind. 1939); Letter of Findings 04-20100111 (March 29, 2010); Letter of Findings 04-20100299 (July 28, 2010); Letter of Findings 04-20100175 (August 23, 2010).

Taxpayer disagrees with the Department of Revenue's decision imposing a sales/use tax assessment on the purchase of an airplane.

STATEMENT OF FACTS

Taxpayer purchased an airplane from a Nevada dealership. No sales tax was paid to Nevada at the time of the transaction. Taxpayer arranged for a Montana attorney to establish a Montana LLC to hold title to the airplane. The only members of the LLC are two individuals, a husband and wife, who reside in Indiana. The Indiana Department of Revenue ("Department") issued a proposed assessment for Indiana use tax. Taxpayer disagreed with the proposed assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer and Taxpayer's representative explained the basis for the protest. This Letter of Findings results. Additional facts will be provided as required.

I. Use Tax – Airplane.

DISCUSSION

The Department assessed use tax on the purchase of the airplane. The Department imposed use tax after determining that no sales tax had been paid on the purchase of the airplane.

Taxpayer disagrees stating that the "Proposed Assessment has been issued for an Aircraft that was purchased by a Montana LLC in the State of Nevada" which is therefore not subject to either Indiana sales or use tax. Taxpayer protests that the airplane was titled by a Montana LLC and that all legal documents establishing the existence of the LLC were properly filed in Montana. Taxpayer additionally maintains that the Montana LLC had a legitimate purpose and that Taxpayer used the airplane for purposes related to the LLC's purpose which is "the business of investing in real and personal property in Montana and in any other lawful business. . . ." Taxpayer maintains that the airplane is used mostly outside Indiana and was in Indiana only during the time one of Taxpayer's members was getting his pilot license.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." As Indiana courts have long held, "In construing tax statutes a liberal rule of interpretation must be indulged in order to aid the taxing power of the state." Dept. of Treasury of Ind. v. Dietzen's Estate, 21 N.E.2d 137, 139 (Ind. 1939). "The statutes of this state relating to the assessment and collection of taxes are liberally construed in favor of the taxing powers." Fell v. West, 73 N.E. 719, 722 (Ind. App. 1905).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

- (a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

The Department's regulation, [45 IAC 2.2-3-4](#), provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross

retail tax has been collected at the point of purchase.

The use tax is functionally equivalent to the sales tax. See *Rhoads v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002). By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. *Id.*; *USAir, Inc. v. Ind. Dep't of State Revenue*, 623 N.E.2d 466, 468–69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. *Rhoads*, 774 N.E.2d at 1048. A taxable retail transaction occurs when; (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a).

The courts have held that "in construing words of a tax statute which describe [any] commercial transactions [the court is] to understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation." *Comm'r v. Transp. Trading & Terminal Corp.*, 176 F.2d 570, 572 (2d Cir. 1949), cert. denied, 338 U.S. 955 (1950). "[T]ransactions that are invalidated by the [sham transaction] doctrine are those motivated by nothing other than the taxpayer's desire to secure the attached tax benefit" but are devoid of any economic substance. *Horn v. Comm'r*, 968 F.2d 1229, 1236-7 (D.C. Cir. 1992). In determining whether a business transaction was an economic sham, two factors can be considered; "(1) did the transaction have a reasonable prospect, ex ante, for economic gain (profit), and (2) was the transaction undertaken for a business purpose other than the tax benefits?" *Id.* at 1237. The question of whether or not a transaction is a sham, for purposes of the doctrine, is primarily a factual one. *Lee v. Comm'r*, 155 F.3d 584, 586 (2d Cir. 1998).

Taxpayer sets out putative reasons for titling an airplane in Montana and provides all the requisite documentation. Taxpayer also points out that Montana does not require a "business purpose to create or organize a Limited Liability Company."

The Department does not contest that the LLC may have been formed for a purpose other than avoiding the tax. However, in determining that Taxpayer was entitled to rely on the representations of the Montana attorney to the extent that Taxpayer did not knowingly commit fraud, the Department also reasonably notes the attorney's own representations on his web page to: "Register your vehicle in Montana. Avoid sales tax and licensing fees." Also, the Department points out that Taxpayer's Montana registration of the aircraft also designates the "Use" of the aircraft with a "P" which means "private."

By Taxpayer's own admission, the aircraft was stored in Dayton, Ohio for a few months after it was purchased in November 2011, and then it was transferred to a hangar in Indiana. Taxpayer provided hangaring invoices from both Indiana and other states. Taxpayer has not shown that the aircraft is used exclusively outside of Indiana. Taxpayer's members are Indiana residents and that the aircraft is hangared in Indiana at least part of the time.

The Department is unable to agree that Taxpayer has met its burden under IC § 6-8.1-5-1(c) of demonstrating that the aircraft is not used or stored in Indiana and that the Department erred in requiring an Indiana resident from paying use tax on an airplane purchased outside the state.

Unfortunately, the Department is unable to accept the proposition that Indiana residents may avoid paying sales and use tax on tangible personal property simply by titling that property outside the state. In this particular case, the Department is unable to agree that either the law, the facts presented by Taxpayer, or simple common sense compel the conclusion that Taxpayer should not be responsible for paying use tax on this airplane. The Department has consistently determined as such. See Letter of Findings 04-20100111 (March 29, 2010) 20100526 Ind. Reg. 045100324NRA; Letter of Findings 04-20100299 (July 28, 2010) 20100929 Ind. Reg. 045100591NRA; Letter of Findings 04-20100175 (August 23, 2010) 20101027 Ind. Reg. 045100650NRA.

FINDING

Taxpayer's protest is respectfully denied.

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